United Nations TD/RBP/CONF.8/L.1

United Nations Conference on Trade and Development

Distr.: Limited
13 May 2015

Original: English

Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
Geneva, 6–10 July 2015
Item 6 (a) of the provisional agenda
Review of application and implementation of the Set

Model Law on Competition (2015) – Revised Chapter I[1]

[1] This is a revision of document TD/RBP/CONF.7/L.1.

GE.15-09648 (E)
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Objectives or purpose of the law

To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

Commentaries on chapter I and alternative approaches in existing legislation

Introduction

1. The role of this article is to state the objectives and purpose of the law, and thus to guide the interpretation and application of its operative provisions. The substantive prohibitions and prescriptions of the law should be interpreted in a manner that furthers the achievement of its objectives and purpose.

2. The article has been drafted in accordance with section E, paragraphs 1 and 2 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which reads as follows:

"1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.

"2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact."

3. As in section A of the Set, States may wish to indicate further specific objectives of the law – such as (a) creation, encouragement and protection of competition; (b) control of the concentration of capital and/or economic power; (c) encouragement of innovation; and (d) protection and promotion of social welfare and in particular the interests of consumers, etc. – and take into account the impact of restrictive business practices on their trade and development.

4. It should be noted that competition law terminology has evolved since the adoption of the Set in 1980. Today, the term anticompetitive business practices/behaviour is more frequently used than the term restrictive business practices.

Objectives

5. The fundamental objective of competition law is to promote and protect competition within markets. A number of more specific goals fall within that overarching objective. The main goals are outlined in this subsection.

Consumer welfare

6. In general, maximizing consumer welfare consists of lowering prices, raising output, enhancing consumer choice and the quality of goods and services and driving technological development and innovation. Among different schools of economic theory, there is, however, a debate on the dimension of consumer welfare. Some schools of thought equate consumer welfare with total welfare (producer and consumer welfare); they do not worry about the transfer of wealth from consumers to producers, which results from higher prices, lower output or any other variable affecting demand. Their main concern is the loss of transactions caused by a distortion of competition. Other schools believe that the consumer welfare objective prioritizes the welfare interests of consumers over those of producers.[2] They are concerned not only with the loss of transactions in less competitive markets, but also with the transfer of wealth from consumers to producers and the ability of more consumers to more actively participate in the market. Another school of thought is concerned about the clarity and consistency of consumer welfare in antitrust enforcement, especially in cases where consumer surplus is not identical to consumer welfare. The latter is a broader concept than the former, as it may refer to non-price product variables, such as consumer preferences for product diversity in media products, which economic methodology might have difficulty taking into account.[3]

Efficiency

7. Efficiency includes allocative efficiency (allocating resources to their most valued use), productive efficiency (producing goods at the lowest cost) and dynamic efficiency (developing better goods and services through innovation). Competition aims to create an environment that incentivizes market participants to enhance efficiency, for example, by investing in technological development or minimizing production costs.

The competitive process

8. Maintaining the competitive process may be considered by some an objective in and of itself. Competition laws may aim to preserve competition as a process in order to curb coercive, exclusionary and exploitative conduct, to prevent the raising of barriers to entry and to preserve rivalrous behaviour in the market.

9. Protecting the competitive process is considered as a means to achieve the objectives of consumer welfare and efficiency.

Other considerations

10. Competition laws may, in addition, include a variety of considerations that are not strictly related to competition or economic efficiency. For example, a number of recitals in competition laws include fair competition as an objective. This may mean protecting opportunities for small and medium-sized enterprises or traditional community economies. Further, some competition laws may refer to national economic development, sometimes including regional development, or other industrial policy goals.

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[2] For further discussion on these schools of thought, see BY Orbach, 2011, The antitrust consumer welfare paradox, *Journal of Competition Law and Economics*, 7(1):133–164.

[3] Ibid.

11. Competition laws and regulations in some jurisdictions such as China, Hungary, Poland and South Africa specifically mention that public interest is an important element to be considered, especially in assessing the competitive impact of mergers. For example, when a merger is considered, section 12 A (1) of the South Africa Competition Act, 1999, requires the Competition Commission or Competition Tribunal to initially determine both the competitive and public interest impacts of the merger. In this regard, though there may be cases where a merger is likely to substantially prevent or lessen competition, it may be approved on substantial public interest grounds. In other instances, despite substantial potential impacts on competition, a merger may not be approved on public interest grounds.

12. Similarly, the China Anti-monopoly Law provides in article 1 that one of its objectives is to safeguard social public interest, and article 28 states that a merger that may eliminate or restrict competition may be approved on public interest grounds.

13. Introducing public interest into competition law enforcement is a controversial matter. It has been suggested that public interest considerations weigh more heavily in developing countries than in developed countries, as there is a greater role for industrial policy and it is important for competition authorities in developing countries to build legitimacy and credibility.[4] The system of apartheid in South Africa resulted in a significant lack of equality in both the political and economic structure of the nation.[5] The South Africa Competition Act forms an important part of reforms designed to both address the historical economic structure and encourage broad-based economic growth.[6]

14. However, there are concerns that public interest considerations could outweigh the original objective of competition law, which is to assess the impact on competition of certain business practices or transactions. Yet there are some ways to enhance certainty in the implementation of public interest provisions and to restrict their arbitrary or political use. For instance, in South Africa, the Competition Tribunal is the adjudicative authority and takes a final decision based on the assessment of both competition and public interest considerations. There is no other political authority that can override this decision, as exists in some countries such as France and Germany. In Germany, the Minister of Economy may approve a merger that has been prohibited by the Federal Cartel Office due to competition concerns if the transaction is likely to produce benefits for the economy as a whole that outweigh the anticompetitive effects of the transaction or if the transaction is justified by public interest that outweighs the competition concerns. The minister enjoys such power despite the fact that there is no general public interest provision in the law. However, only eight ministerial approvals have been granted since the introduction of the provision for ministerial approval in 1973, with the most recent decision in 2008.[7] Similarly, in France, the Ministry of Economy may have the last word in merger cases where the country's fundamental interests are at stake.[8]

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[4] D Lewis, 2002, The role of public interest in merger evaluation, paper presented at the International Competition Network Merger Working Group, Naples, Italy, 28–29 September.

[5] D Lewis, 2012, *Thieves at the Dinner Table: Enforcing the Competition Act – A Personal Account* (Cape Town and Johannesburg, South Africa, Jacana Media).

[6] S Roberts, 2004, The role for competition policy in economic development: the South African experience, Working Paper 8, Trade and Industrial Policy Strategies.

[7] E Nittväli and M Reysen, 2015, Germany: Merger control, The European Antitrust Review, Global Competition Review, available at http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2489/germany-merger-control/ (accessed 7 May 2015).

[8] A Choffel, A Glatz and Y Utzschneider, 2015, France: Merger control, The European Antitrust Review, Global Competition Review, available at http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2484/france-merger-control/ (accessed 7 May 2015).

15. In the United States of America, the jurisprudence takes a hard line against the inclusion of non-competition issues as part of an antitrust analysis. For example, the Supreme Court of the United States has stated that the purpose of antitrust analysis "is to form a judgement about the competitive significance of the restraint; it is not to decide whether a policy favouring competition is in the public interest, or in the interest of the members of an industry".

16. Many States' competition laws will include many or all of these objectives. Often, they may be reconciled, but occasionally they will conflict. This is most likely where a State's competition law includes public interest goals that do not strictly relate to competition or economic efficiency. There is a degree of ambiguity in the boundaries of these objectives, which must be resolved over time by the decisions of courts or competition authorities.

Alternative approaches in existing legislation

17. Alternative approaches in existing legislation to the objectives or purpose of competition law are detailed in the table.

Country, territory or group by region		*Objective or purpose*
Africa		
1.	Algeria	Article 1 of Competition Ordinance No. 03-03, dated 19 July 2003, amending Ordinance No. 95-06, dated 25 January 1995, provides that the Ordinance "is to establish the conditions for exercise of market competition, to prevent any restrictive practice and control economic concentrations to stimulate economic efficiency and improve consumer welfare". Compared to Ordinance No. 95-06, the new competition law includes the prevention of restrictive behaviour and practices in the Algerian market as one of its objectives.
2.	Gambia	The objective of Competition Act No. 4, 2007, is to "promote competition in the supply of goods and services, by prohibiting collusive agreements and bid rigging, by providing for investigation and control of other types of restrictive agreements and of monopoly and merger situations, by promoting understanding of the benefits of competition".
3.	Namibia	Chapter 1 of Competition Act No. 2, 2003, states that the purpose of the Act is to "enhance the promotion and safeguarding of competition in Namibia in order to (a) promote the efficiency, adaptability and development of the Namibian economy; (b) provide consumers with competitive prices and product choices; (c) promote employment and advance the social and economic welfare of Namibians; (d) expand opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia; (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and (f) promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons". Competition law in Namibia assumes a public interest function alongside core competition law considerations.
4.	South Africa	Article 2 of chapter 1 of Competition Act No. 89, 1998, states that the "purpose of this Act is to promote and maintain competition in the Republic in order (a) to promote the efficiency, adaptability and development of the economy; (b) to provide consumers with competitive prices and product choices; (c) to promote employment and advance the

Country, territory or group by region		*Objective or purpose*
		social and economic welfare of South Africans; (d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic; (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons". The Competition Amendment Act 1, 2009, did not alter the public interest objectives of Competition Act No. 89. However, new paragraphs (g) and (h) were added to article 2 of chapter 1 as follows: "(g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to prevent, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic; and (h) to provide for consistent application of common standards and policies affecting competition within all markets and sectors of the economy."
5.	United Republic of Tanzania	Section 3 of the Fair Competition Act, 2003, states that the object of the Act is to "enhance the welfare of the people of the United Republic of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout the United Republic of Tanzania in order to (a) increase efficiency in the production, distribution and supply of goods and services; (b) promote innovation; (c) maximize the efficient allocation of resources; and (d) protect consumers".
6.	Zambia	Zambia enacted the Competition and Consumer Protection Act, 2010, which replaced the Competition and Fair Trading Act, 1994. The 2010 Act renamed the Zambian Competition Commission as the Competition and Consumer Protection Commission. The preamble of the 2010 Act sets out the objectives of the Act, which are to safeguard and promote competition and protect consumers against unfair trade practices.
Asia and Pacific		
7.	Australia	Section 2 of the Competition and Consumer Act, 2010, states that the object of the Act is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".
8.	China	Article 1 of the Anti-monopoly Law, which was adopted in 2007 and came into force in August 2008, provides that the law is enacted "for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy".
9.	Hong Kong	The preamble of the Competition Ordinance, 2012, provides the objectives of the law, which are to prohibit conduct that prevents, restricts or distorts competition in Hong Kong and to prohibit mergers that substantially lessen competition in Hong Kong.
10.	Taiwan	The legislative purpose of the Fair Trade Act, 2011, as stated in article 1, chapter 1, is to maintain trading order, protect consumers' interests, ensure fair competition and promote economic stability and prosperity.

Country, territory or group by region		*Objective or purpose*
11.	India	Section 1 of the Competition Act, 2002 (as amended by the Competition (Amendment) Act, 2007), states that the objective of the Act is "keeping in view the economic development of the country... to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental to".
12.	Japan	The purpose of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, No. 54, dated 14 April 1947, as stated in article 1, is to "promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers".
13.	Malaysia	The preamble of the Competition Act, 2010, states that the objective of the Act is to "promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers". It is also noted that the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers. It is further stated that, "it is the purpose of this legislation to prohibit anticompetitive conduct".
14.	Mongolia	Article 1 of the Law on Competition, 2010, states that the purpose of the Law is to "establish conditions of fair competition on the market by corporate entities, prevent and prohibit any activities of market monopolization or hostility to competition and defining the legal basis of the institution regulating the competition".
15.	New Zealand	The purpose of the competition legislation is to "promote competition in markets for the long-term benefit of consumers within New Zealand" (Section 1 A, Commerce Act, 1986, inserted as from 26 May 2001 by section 4 of Commerce Amendment Act No. 32, 2001).
16.	Republic of Korea	Article 1 of the Monopoly Regulation and Fair Trade Act, as amended in 2013, states that the purpose of the Act is to "promote fair and free competition, through the prohibition of the abuse of a market dominant position, excessive concentration of economic power, unjust concerted practices and unfair trade practices, and thereby stimulating the innovative activities of undertakings, protecting consumers and achieving the balanced economic development".
Europe (non-European Union)		
17.	Albania	The Law on Competition Protection, No. 9121, 2003, as stated in article 1, "aims at protecting fair and effective competition in the marketplace, defining the rules of conduct by undertakings, as well as the institutions responsible for protection of competition and their competencies".
18.	Armenia	The purpose of the Law on Protection of Economic Competition as supplemented by the HO-N Law adopted in 2007, as stated in article 1, is to "protect and encourage free economic competition, ensure appropriate environment for fair competition, promote development of entrepreneurship and protection of consumers' rights" in Armenia.

Country, territory or group by region		*Objective or purpose*
19.	Iceland	Article 1 of Competition Law No. 44/2005 provides that the objective of the Law is to "promote effective competition and thereby increase the efficiency of the factors of production of society. This objective shall be achieved by (a) preventing unreasonable barriers and restrictions on freedom of economic operation; (b) preventing harmful oligopoly and restriction of competition; (c) facilitating the entry of new competitors into the market".
20.	Norway	The objective of the Competition Act, 2004 (last amended in 2014), as stated in section 1, is to "further competition and thereby contribute to the efficient utilization of society's resources". When applying the Act, special consideration shall be given to the interests of consumers.
21.	Russian Federation	The objectives of Federal Law No. 135-FZ on the protection of competition, dated 16 July 2006 (as amended in 2011), as stated in article 1, are to "ensure common economic area, free movement of goods, protection of competition and freedom of economic activity in the Russian Federation and to create conditions for effective functioning of the goods markets".
22.	Serbia	As stated in article 1, the law on protection of competition regulates the "protection of competition on the market of the Republic of Serbia, with the aim of economic progress and welfare of the society, and in particular to the benefit of the consumers".
23.	Switzerland	The Federal Act on Cartels and Other Restraints of Competition, 1996 (as amended), as stated in article 1, chapter 1, seeks to "prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles".
24.	Turkey	Article 1 of the Act on the Protection of Competition, No. 4054, states that the purpose of the Act is to "prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end".
25.	Ukraine	The preamble of the Law on the Protection of Economic Competition, last amended in 2011, states that the Law "shall define the legal grounds for the maintenance and protection of economic competition, for the limitation of monopolism in economic activities and shall be directed towards ensuring the efficient functioning of the economy of Ukraine on the basis of the development of competitive relations".
European Union		
26.	Denmark	The objective of the Competition Act (Consolidation Act No. 700, dated 18 June 2013) is to "promote efficient resource allocation in society through workable competition for the benefit of undertakings and consumers".
27.	Estonia	The scope of application of the Competition Act, 2001 (as amended in 2013), as stated in article 1, section 1, is the "safeguarding of competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services... and the preclusion and elimination of the prevention, limitation or restriction... of competition in other economic

Country, territory or group by region		*Objective or purpose*
		activities". In addition, legislation "applies if an act or omission directed at restricting competition is committed outside the territory of Estonia but restricts competition within the territory of Estonia".
28.	France	There is no explicit statement of purpose in France's competition legislation.
29.	Germany	The Act Against Restraints of Competition does not include a provision on the aim or objective of the Act.
30.	Hungary	The Competition Act, 1996 (last amended in 2010), as stated in the preamble, aims to protect the "public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers".
31.	Spain	The objectives of the Competition Act, 2007, are stressed in an explanatory statement, which states that the existence of effective competition between businesses constitutes one of the defining elements of the market economy, disciplines the action of businesses and reallocates productive resources in favour of the most efficient operators or techniques. This productive efficiency translates to the consumer in the form of lower prices or an increase in the quantity offered of the products, their variety and quality, with the subsequent increase in the welfare of society as a whole. Consequently, it is necessary to have a system that, without intervening unnecessarily in free business decision-making, allows for the adequate instruments to guarantee the good functioning of market processes.
32.	Sweden	The Competition Act 2008:579, dated 18 June 2008, as stated in article 1, chapter 1, aims to "eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products".
33.	European Union	Article 3 (1) (g) of the Treaty Establishing the European Community, which listed one of the objectives of the European Community as the implementation of "a system ensuring that competition in the internal market is not distorted", was repealed by the Treaty of Lisbon. Articles 2 and 3 of the Treaty on European Union setting out the values and aims of the European Union do not mention expressively "undistorted competition" but instead mention the establishment of an internal market as an objective and refer to "a highly competitive social market economy". However, the new legally-binding Protocol 27 on Internal Market and Competition states that "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted". The Court of Justice of the European Union elaborated on Article 101 of the Treaty on the Functioning of the European Union, stating that it aims to protect not only the interests of competitors or consumers but also the structure of the market and, in so doing, competition as such (Case C-8/08, 4 June 2009).
Latin America		
34.	Brazil	Article 1 of Law No. 12.529, dated 30 November 2011, "sets forth preventive measures and sanctions for violations against the economic order, guided by the constitutional principles of free competition, freedom of initiative, social role of property, consumer protection and prevention of

Country, territory or group by region		*Objective or purpose*
		the abuse of economic power" and the Law also states that "the people are the holders of the legal interests protected by this law".
35.	Colombia	Article 333 of the Constitution adopted in 1991 made competition a constitutional right, stipulating that the State should pass laws that prevent "the obstruction or restriction of economic liberty and shall prevent or control any form of abuse that persons or businesses make of their dominant market position". The objective of the competition law, Law No. 1340, amended in 2009, as stated in article 1, is to update the regulations on the protection of competition to adapt to current market conditions, facilitate its adequate monitoring by users and optimize the tools available to national authorities for fulfilling the constitutional duty of protecting free economic competition in the national territory.
36.	Costa Rica	The objective of the Law on the Promotion of Competition and Effective Protection of Consumers, No. 7472, as stated in article 1, is to protect effectively the rights and legitimate interests of consumers, to protect and promote the process of free competition by preventing and prohibiting monopolies, monopolistic practices and other restrictions on the efficient operation of the market and to eliminate unnecessary regulations of economic activities.
37.	Panama	The purpose of the competition law, Law No. 45, dated 31 October 2007, as stated in article 1, is to "protect and ensure the process of free economic competition, by eliminating monopolistic practices and other restraints on the efficient functioning of the markets for goods and services, in order to safeguard the greater interests of consumers".
38.	Peru	Legislative Decree No. 1044, 2008, as stated in article 1, aims to suppress any act or conduct of unfair competition, the real or potential effect of which is to impact or prevent the appropriate functioning of the competitive process.
39.	Bolivarian Republic of Venezuela	Article 1 of the Law to Promote and Protect the Exercise of Free Competition, 1992, states that the objective of the Law is to "promote and protect the exercise of free competition and efficiency in the benefit of producers and consumers; and to prohibit monopolistic and oligopolistic practices and conduct and other means that could impede, restrict, falsify or limit the enjoyment of economic freedom".
40.	Andean Community	Article 1 of Decision 285, Commission of the Cartagena Agreement, states that regulation seeks to "prevent or correct distortions in competition caused by practices that restrict free competition".
41.	Southern Common Market (MERCOSUR)	The objective of the Protocol for the Protection of Competition in MERCOSUR, Decision 18/96, dated 17 December 1996, is to "protect competition within MERCOSUR".
North America		
42.	Canada	The purpose of the Competition Act, 1985 (as amended), as stated in section 1.1, is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in

Country, territory or group by region		*Objective or purpose*
		order to provide consumers with competitive prices and product choices".
43.	United States	The antitrust legislative framework was "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions" (Northern Pacific Railway Company versus United States, 356 United States 1 (Supreme Court of the United States, 1958)).